



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

July 25, 1995

Honorable Gonzalo Barrientos
Chair
Committee of the Whole on Legislative
and Congressional Redistricting
Texas State Senate
P. O. Box 12068
Austin, Texas 78711

Letter Opinion No. 95-046

Re: Whether article III, section 3, of
the Texas Constitution requires state
senators to redraw lots to determine
the lengths of their terms after a fed-
eral court order changing district
boundaries is entered (ID-34680)

Dear Senator Barrientos:

The Texas Constitution requires the legislature to apportion the state into senatorial and representative districts "at its first regular session after the publication of each United States decennial census." Tex. Const. art. III, § 28. Should the legislature "fail to make such apportionment," the duty to reapportion falls to the Legislative Redistricting Board, composed of the Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts, and the Commissioner of the General Land Office. *Id.* Then, "after every apportionment," a new senate must be chosen, with those state senators elected after the apportionment required to draw lots to determine the lengths of their terms of office. Tex. Const. art. III, § 3.

In Attorney General Opinion DM-351, this office concluded that the enactment of legislation changing the boundaries of two senatorial districts would constitute an "apportionment" for purposes of section 3, thus necessitating the election of a new senate and a subsequent redrawing of lots by all state senators to determine the lengths of their terms. Attorney General Opinion DM-351 (1995) at 3. In that opinion, we declared in a footnote that we were not addressing whether section 3 required the election of a new senate, with senators redrawing lots, after a court-ordered redistricting.¹ *Id.* at 1 n.1. As a consequence, you ask two questions about the effect of court-ordered redistricting and the proper construction of section 3.

You first ask:

¹We note that, for purposes of section 3 of article III, this office already has held that there is no meaningful distinction between "apportionment" and "districting." See Attorney General Opinion DM-351 (1995) at 3; see also Attorney General Opinion M-349 (1969) at 3 ("Redistricting of the Senate has consistently been recognized as an apportionment . . .").

If senators draw lots (after a new census) to determine the length of terms, and if after that drawing of lots a federal court orders the use of different senate districts, then does Article III, Section 3, of the Texas Constitution require that a new drawing of lots occurs to determine the length of terms of all senators?

Section 3 of article III of the Texas Constitution provides the following in pertinent part:

The Senators shall be chosen by the qualified electors for the term of four years; but a new Senate shall be chosen after every apportionment, and *the Senators elected after each apportionment shall be divided by lot into two classes*. The seats of the Senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one half of the Senators shall be chosen biennially thereafter.

Tex. Const. art. III, § 3 (emphasis added).

We do not understand you to ask whether a state or federal court of competent jurisdiction may direct that a new senate be elected, with state senators redrawing lots, incident to fashioning a redistricting order resulting from a constitutional challenge. That issue has been resolved. *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964) (federal district court empowered to hold apportionment plan for state legislature unconstitutional and to adopt temporary plan); *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991) (state courts in Texas empowered to declare whether an apportionment statute enacted by the legislature is constitutional and to impose a substitute apportionment plan upon state); *see, e.g., Terrazas v. Clements*, 581 F. Supp. 1319 (N.D. Tex. 1983) (federal district court held a pre-1981 apportionment plan for state legislature unconstitutional and adopted a temporary plan, including requirement for new election).

Rather, we understand you to ask whether the phrase "after each apportionment" set forth in section 3 includes within its ambit an order to "reapportion" (or, more properly, to "redistrict") entered by such a court. Or to put it differently, we understand you to ask whether, absent any provision in an agreed federal court order so requiring, section 3 operates, as a matter of law, to require a new election in an instance in which a federal court orders that the boundaries of two senatorial districts be changed. We conclude that section 3 does not require the election of a new senate, with state senators redrawing lots, after a state or federal court has ordered a change in district boundaries.

In construing a constitutional provision, we must be guided by accepted rules of construction. *State v. Clements*, 319 S.W.2d 450 (Tex. Civ. App.--Texarkana 1958, writ ref'd); *see, e.g., Purcell v. Lindsey*, 314 S.W.2d 283 (Tex. 1958); *Farrar v. Board of Trustees*, 243 S.W.2d 688 (Tex. 1951); *Cramer v. Sheppard*, 167 S.W.2d 147 (Tex. 1942). In an instance in which the legislature sets forth the means for accomplishing a

certain thing, that method is exclusive of all others. *See, e.g., Dawkins v. Meyer*, 825 S.W.2d 444 (Tex. 1992); *Weaver v. Robinson*, 268 S.W. 133 (Tex. 1925); *Ferguson v. Halsell*, 47 Tex. 421 (1877). The same rule applies to the construction of the constitution. Thus, where the constitution specifies how something is to be done, that specification is a prohibition against that thing being done some other way. *Ferguson v. Wilcox*, 28 S.W.2d 526 (Tex. 1930); *R.R.E. v. Glenn*, 884 S.W.2d 189 (Tex. App.--Fort Worth 1994, writ denied).

In this instance, the constitutional scheme for apportionment, taken as a whole, clearly contemplates the election of a new senate and the drawing of lots only after apportionment, effected either by the legislature itself or, failing that, by the Legislative Redistricting Board. Under no other circumstance are a new election and a subsequent drawing of lots required. That a state or federal court of competent jurisdiction is empowered to rule on the constitutionality of an enacted statute effecting an apportionment and, if required by the dictates of constitutional precedent, to substitute a plan of the court's device for that enacted by the legislature is beyond cavil. *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991). But a state court's exercise of that authority is not derived from the state constitution's provisions governing apportionment; rather, its power derives from article V of the Texas Constitution and the inherent authority of the courts. *See, e.g., United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex. 1965); *Central Educ. Agency v. Independent Sch. Dist.*, 254 S.W.2d 357 (Tex. 1953); *Railroad Comm'n v. Magnolia Petroleum Co.*, 109 S.W.2d 967 (Tex. 1937). A state (or federal) court's review of an apportionment statute is not part of the apportionment process specifically provided for in article III of the Texas Constitution; therefore, we conclude that a court-ordered apportionment is not an "apportionment" for purposes of section 3 of article III, at least in an instance in which the legislature already has enacted an apportionment statute pursuant to section 28, a new election has been held, and lots already have been drawn prior to the entry of the court's order changing two district's boundaries.

With your second question, you ask:

If senators draw lots (after a new census) to determine the length of terms, and if after that drawing of lots the legislature enacts redistricting legislation to settle a lawsuit challenging senate districts, then does Article III, Section 3, of the Texas Constitution require that a new drawing of lots occurs to determine the length of terms of all senators?

Your second question was addressed in Attorney General Opinion DM-351 (1995). There we were asked the following three questions:

If the legislature makes changes to only two of thirty-one senate districts, will the bill be considered as a general apportionment

which would necessitate the election of a new senate at the next election?

If the legislature makes changes to more than two but not all of the current senate districts, would the changes necessitate the election of the whole new senate or only the senate districts with changes?

Does the extent of the changes to senate districts affect the answer to the preceding questions?

Relying on the only extant authority addressing these questions, Attorney General Opinion M-349 (1969), we concluded that the passage of legislation changing two senatorial districts would constitute an apportionment for purposes of section 3 of article III, thus necessitating a new election and a redrawing of lots by senators to determine the lengths of their terms:

[W]e conclude that the passage of legislation changing two senatorial districts would constitute an apportionment under article III, section 3 of the Texas Constitution requiring the election of a new senate. In response to your second question, it follows from our affirmative answer to your first question that legislation changing more than two senatorial districts would also constitute an 'apportionment.' In response to your third question, the extent of changes to senatorial districts does not affect our answer to your first and second questions. Article III, section 3 makes no distinction between an 'apportionment' of senatorial districts that affects merely two districts and an 'apportionment' of senatorial districts that affects all thirty-one districts.

Attorney General Opinion DM-351 (1995) at 3-4. Therefore, in answer to your second question, we conclude that, if the legislature were to enact redistricting legislation for the purpose of settling a lawsuit after the enactment of earlier legislation, the holding of an election, and the drawing of lots, such legislation would constitute an "apportionment" for purposes of article III, section 3, of the Texas Constitution, thus necessitating a new election and a redrawing of lots.

S U M M A R Y

Section 3 of article III of the Texas Constitution does not require a new election of state senators and a subsequent redrawing of lots to determine the lengths of their terms in an instance in which a state or federal court of competent jurisdiction issues a redistricting order; such an order is not an "apportionment" for purposes of section 3.

The passage of legislation changing two senatorial districts would constitute an apportionment for purposes of section 3 of

article III, thus necessitating a new election of state senators and a redrawing of lots by senators to determine the lengths of their terms.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Jorge Vega', with a stylized flourish at the end.

Jorge Vega
First Assistant Attorney General